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McLEODUSA TELECOMMUNICATIONS SERVICES, INC., **Complainant,** **v.** **QWEST CORPORATION,** **Respondent**	**DOCKET NOS. T-03267A-06-0105** **T-01051B-06-0105** **QWEST CORPORATION'S ANSWER TO MCLEOD'S APPLICATION FOR REHEARING**

Arizona Corporation Commission
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I. INTRODUCTION

Qwest Corporation ("Qwest") hereby files its Answer to the Application for Rehearing of Decision No. 69872 filed by McLeodUSA Telecommunications Services, Inc. ("McLeod"). Qwest asks the Arizona Corporation Commission ("Commission") to deny McLeod's Application for Rehearing and to affirm the findings and conclusions of the Commission's Opinion and Order ("Order") dated August 28, 2007.

McLeod's Application for Rehearing presents no new information, evidence, or legal argument to the Commission – it is essentially a rehash of prior, rejected arguments. These arguments

amount to little more than a request that the Commission re-write the parties' contract – a contract with terms that were undisputed prior to the amendment at issue, a contract which clearly allowed and required Qwest to bill McLeod for both power plant and power usage on the basis of the size of McLeod's power order. Now, having lost on the issue of the interpretation of the Amendment, McLeod pleads with the Commission to analyze and interpret the underlying ICA – an issue which McLeod has already raised, and upon which McLeod did not prevail.[1] Indeed, as the Commission found, "[p]rior to entering into the Amendment, Qwest billed McLeod for DC Power based on two separate charges, one for capacity and one for usage."[2] Thus, it is clear that the Commission rendered its decision in this matter with full awareness that it was interpreting an Amendment to an ICA, and the Commission did not, as McLeod alleges, fail to consider the entire agreement or the context in which the Amendment exists.

McLeod's current interpretation of the Power Measuring Amendment is at odds with the language of the Amendment, with McLeod's intent at the time it entered into the Amendment in 2004, and at odds with Qwest's express intent regarding the effect of the Amendment both before and after it was executed. There is simply no basis upon which to hold in McLeod's favor on the contract issues. Nor is there any merit to McLeod's discrimination claims. The Order ruled correctly on both issues and should be affirmed.

II. ARGUMENT

A. McLeod's Contract Claims are Unfounded

McLeod's primary assignment of error regarding the contract issues is that the Commission

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[1] For example, the Commission discussed McLeod's position in paragraphs 53-55 of the Order, noting that McLeod's arguments address both the Amendment and the underlying ICA. Indeed, the Commission specifically cited a portion of McLeod's argument that addressed Part D, Section (D)2.1 of the ICA. Thus, it is clear that the arguments that McLeod raises in its Application for Rehearing have already been heard and addressed by the Commission.

[2] Order, ¶ 101.

failed to consider the entire interconnection agreement ("ICA") between McLeod and Qwest in deciding whether the parties had agreed that DC Power Plant Charges would be assessed on a measured basis, rather than just the DC Power Measuring Amendment. This argument is inaccurate because the August 28 Order discusses section (D)2.1 of the underlying ICA – the very section McLeod claims the Commission ignored.[3]

The argument is also disingenuous. In its Complaint and in McLeod's testimony, McLeod acknowledged that "under the original arrangements between the parties, Qwest billed McLeod for DC power based on the amount of DC power originally ordered by McLeod on the collocation application."[4] McLeod further acknowledged during the hearing that it was "not objecting to [Qwest's] interpretation" that the underlying ICA provided for power plant charges to be assessed based on the number of amps specified in the power feed orders.[5] This charge was billed and paid regardless of the number of amps McLeod equipment drew in a particular month.

McLeod alleged in its direct testimony that "McLeodUSA believes the *Amendment* is clear in requiring that all rate elements included within the *-48 Volt DC Power Usage* section of Exhibit A . . . . be assessed based upon measurements undertaken by Qwest to identify McLeodUSA's actual power consumption. Qwest, on the other hand, interprets the agreement as requiring that only one of those two rate elements (8.1.4.1.2.2) be billed based on actual, measured consumption. The other DC power usage charge (8.1.4.1.1.1 – *Power Plant Greater Than 60 Amps*), according to Qwest, should be billed based upon the ordered size of McLeodUSA's power distribution cables."[6]

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[3] Order, ¶ ¶ 55, 106, and 107.
[4] Complaint, ¶ 5.
[5] Tr. II.221.18 -222.11.
[6] *Starkey Direct Testimony, Exhibit M-1, p. 8.*

Now, after the Commission has interpreted the DC Power Measuring Amendment in Qwest's favor, the very amendment upon which McLeod based its claim, McLeod argues that the Commission ignored the underlying ICA, which in McLeod's revised view provided for DC Power Plant charges at measured levels irrespective of the DC Power Measuring Amendment.

McLeod never claimed or proved any intent that the underlying ICA would or did provide for charging DC Power Plant at measured levels prior to the execution of the DC Power Measuring Amendment. The evidence is to the contrary. As McLeod's witness Tami Spocogee testified, McLeod never even interpreted the Amendment to implement as-measured charges until months after the Amendment was issued, and years after the underlying ICA was executed:

> Q. The first time McLeodUSA ever looked at the power plant element and calculated power plant savings was in connection with the audit that you, your specific group, Tami Spocogee's group, performed around May 2005, several months after the agreement was entered, correct?
>
> A. As far as I know. I have not seen any other documents.
>
> Q. And to your knowledge the first time anyone at McLeodUSA came to the interpretation McLeod is now advancing in this case was in May 2005, again after your group conducted its audit, correct?
>
> A. Correct.[7]

Thus, McLeod's Application for Rehearing not only represents a new argument and inaccurately describes the Commission's analysis, it directly contradicts the testimony of McLeod's own witnesses. In the face of the evidence that it had never previously objected to Qwest's interpretation of the underlying ICA that it provided for DC Power Plant to be charged at as-ordered levels, and its own testimony that it does not object to that interpretation in these proceedings, McLeod cannot now claim that the DC Power Measuring Amendment and the parties' demonstrated intent with regard to that amendment is irrelevant, such that the parties had

[7] Tr. II.268.2-16.

agreed that DC Power Usage and Power Plant charges would be assessed at measured levels in the original ICA. This argument would render the entire DC Power Measuring Amendment nugatory, and must be rejected in favor of Qwest's interpretation, which gives effect to the language of both the ICA and the DC Power Measuring Amendment, and is consistent with the extrinsic evidence of intent with respect to both documents.

McLeod also states that the Order erroneously interpreted the DC Power Measuring Amendment as ambiguous.[8] However, this argument is essentially McLeod's non-discrimination argument, recast. What McLeod is saying is that if the Commission properly considers the non-discrimination obligations imposed by the Act and the ICA, there is no question as to how the Amendment has to be interpreted, and therefore no ambiguity to resolve. These arguments are addressed in Section B., *infra*, and are negated by the fact that this Commission properly found that the Amendment is not discriminatory under Qwest's interpretation.

The problem with McLeod's argument is that does not contest the findings of the Order that the extrinsic evidence of intent reveals that the parties intended only that the Power Usage charges would be changed, not the Power Plant charges. McLeod's argument against the Order's conclusions regarding ambiguity is that the term "power usage" in the DC Power Measuring Amendment includes Power Plant charges, even though Power Plant charges are never mentioned in the Amendment.

Not only does the Amendment repeatedly mention the "power usage" charge and the "usage" rate multiple times in the Amendment without ever mentioning the separately determined and separately billed Power Plant charge, section 1.2 of the Amendment plainly excludes the possibility that "power usage" include "power plant" rates. That section, the first operative

[8] *Application for Rehearing*, pp. 1-3.

section of the Amendment, provides that "the power usage rate reflects a discount from the rates for those feeds greater than sixty (60) amps." In the Exhibit A, the rate for "power usage" is lower for feeds of less than sixty amps ($3.84 per amp ordered) than for feeds of greater than sixty amps ($7.27 per amp ordered) – this is consistent with the reference to "a discount" in section 1.2. In contrast, the rate for "power plant" in Exhibit A to the underlying interconnection agreement[9] indicates the same rate of $10.75 for orders greater than, equal to, or less than 60 amps. This rate structure indicates *no* discount for smaller power plant orders. Thus, the term "power usage rate" as used throughout the Amendment cannot include or refer to any "power plant" charges without ignoring the plain language of section 1.2.

McLeod then argues that if the Amendment is ambiguous, then the extrinsic evidence supports its interpretation. In its Petition for Rehearing, McLeod points to a single item of extrinsic evidence: that "the unified DC power rates are billed on a measured basis in Oregon and South Dakota."[10] While Qwest does not agree that it is a particularly significant piece of evidence, this evidence actually provides further support for Qwest's interpretation. As McLeod notes, in South Dakota and Oregon there is only a single rate element for DC Power. In Arizona, the Cost Docket approved two different rates: one for Power Usage and one for Power Plant. However, McLeod conveniently omits the fact that in every state where the commission approved two different rates, only the Power Usage rate reflects measured usage under the Amendment. The different methodology used for South Dakota and Oregon is the exception that proves the rule. McLeod argues that Oregon and South Dakota reflect "the same billing that McLeodUSA expected in Arizona, and is arguing for in this proceeding – billing for power on a measured usage basis for all power rate elements."' However, this assertion must be tested against the other extrinsic evidence that is relevant to this point – that extrinsic evidence, in the form of a

[9] Hearing Exhibit Q-1 (WRE-2 at 2).
[10] McLeod's Petition at 4.

spreadsheet prepared by McLeod, establishes that McLeod in fact had *no* expectation that the power plant rate would be billed on a measured basis.[11] The changes in interpretation and application of the Amendment after the CMP process do not support McLeod's interpretation of the Amendment. Moreover, to the extent that the contracts between McLeod and Qwest in other states are relevant, it is worth observing that five different state commissions have heard the same dispute as to which McLeod currently seeks rehearing here – Arizona, Iowa, Washington, Utah, and Colorado – and all five commissions have held that the extrinsic evidence supports Qwest's interpretation that the parties never intended to change how power plant charges would be billed with the Amendment.

B. McLeod's Discrimination Claims are Unfounded

At pages 4-11 of the Application for Rehearing, McLeod renews its discrimination claim, arguing that the record in this case is adequate to find discrimination, and that the Order concludes that "Qwest may 'reasonably' discriminate against McLeodUSA."[12] McLeod is wrong on both counts. As the Commission clearly found, "McLeod has not demonstrated on this record that Qwest is improperly discriminating against McLeod."[13] The Commission examined the record evidence and concluded, based on application of the proper legal standard, that McLeod has not established discrimination on the record in this case. This decision is consistent with the findings of the four other state commissions that have considered and decided this issue to date.

1. The Commission did not apply the wrong legal standard to the discrimination claim

McLeod claims, at pages 4-8 of its Application for Rehearing, that the Commission applied the

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[11] Order at ¶ 101.
[12] Application for Rehearing, pp. 4-7.
[13] Order at ¶ 107.

wrong legal standard to the discrimination claim. McLeod claims that it has shown that Qwest provides power to McLeod on terms and conditions less favorable than it does to itself and that a finding of discrimination must therefore follow. McLeod is wrong for at least two reasons.

First, Qwest does not "charge" itself power plant rates – Qwest engineers for its own needs at List 1 drain. If anything, Qwest provides a *superior* level of power capacity to CLECs, and charges for that capacity in accordance with Commission-approved rates under a Commission-approved ICA. Such conduct is specifically permitted under the Act and does not call discrimination issues into play. Qwest allows the CLEC to specify the amount of power it orders and will be billed for, as it does for itself (generally of course, since Qwest does not technically collocate in its own central offices and does not actually "order" power from itself). Qwest allows the CLECs to reduce the amount of power ordered through a power reduction amendment. These terms and conditions are not less favorable for the CLECs, and in fact provide the CLECs with the power plant capacity they order and expect. This engineering construct and resulting rate design was vetted through the cost docket and approved as compliant with applicable state and federal law. These rates are just, reasonable, and non-discriminatory, and McLeod's arguments to the contrary are unavailing.

Although McLeod attempts to argue that Qwest must treat McLeod in a manner that is ***identical*** to how it treats itself, that is clearly not the state of the law. No case or FCC opinion has ever imposed an "absolute" or "unqualified" standard of non-discrimination as McLeod contends. Even paragraph 217 from the FCC's First Report and Order, which McLeod cited in its Petition, does not state that there is an absolute prohibition against different treatment, but merely that the standards for nondiscrimination under section 251 are "more stringent" than those under section 202. All differences are not discrimination. For example, with caged collocation, CLECs who are physically collocated place their equipment in locked cages. Clearly Qwest does not place its

own equipment in locked cages, and just as clearly this practice does not constitute discrimination.

Second, as discussed in Qwest's post hearing briefing in this matter[14], the parties to an ICA are free to agree to terms and conditions *without regard* to the non-discrimination provisions of the Act.[15] Though McLeod spends a considerable amount of time discussing what it calls the "unqualified" or "strict" non-discrimination requirements set forth the First Report and Order, it utterly ignores the language of the Act itself, the law that the First Report and Order implements. That law, at its very heart, allows parties to agree to all manner of terms and conditions in an ICA, including those at issue here, and if agreed to (and McLeod cannot really escape the conclusion that it agreed to these terms, in spite of its post-hoc protests to the contrary), the non-discrimination provisions are not even the subject of objection or inquiry.

In fact, the Act specifically contemplates that the parties to an ICA can consent to any manner of terms and conditions and rates, and with consent, there is no discrimination. And that is precisely the point. McLeod *did* consent to the application of the power plant rates on an as-ordered basis in its interconnection agreement. There is no evidence that McLeod tried to obtain a different rate or rate design at the time the contract was formed. There is no evidence that Qwest has failed to apply the rate as originally agreed. There is no evidence that Qwest somehow changed the way it operates between the execution of the interconnection agreement and the present to somehow shift the playing field to disadvantage McLeod. To the contrary, the bargain that the parties struck is the one that is still in place, on terms and conditions and with

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[14] See, Qwest Corporation's Post-Hearing Reply Brief, discussion at pp. 23-25.

[15] Qwest does not agree that the Power Plant rate structure disadvantages McLeod, for all the reasons discussed in this and Qwest's other filings. Nevertheless, assuming, *arguendo*, that it does, it is nevertheless non-discriminatory because of McLeod's voluntary agreement to that rate structure. See, e.g., Section 252(a)(1) which provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title." Subsections (b) and (c) of Section 251 contain the non-discrimination standards upon which McLeod relies.

rates already determined by the Commission to be non-discriminatory.

The parties' Commission-approved interconnection agreement is a binding contract that the Commission has authority to enforce, but not change outside the context of an arbitration.[16] Once the Commission has found that the Amendment did not alter those charges, as it must, McLeod cannot unilaterally amend the underlying agreement by claiming that a term to which it previously *freely agreed,* regarding a rate approved by the Commission as non-discriminatory, within an agreement separately approved by the Commission as non-discriminatory, is discriminatory.

2. Qwest's engineering practices and guidelines

McLeod further claims that the Order "blames" McLeod for failing to provide List 1 drain, when instead the Commission should hold Qwest accountable for failing to do so and should find that such conduct is discriminatory. [17] Again, this argument misses a number of points, already considered by the Commission in entering its Order. First, McLeod never challenged the application of the Power Plant rate element prior to the Amendment – thus, the Order is more than justified in concluding that the "as ordered" billing was an agreed-upon term. Second, Qwest established on this record that the way it asks CLECs to order power plant capacity, and the way it bills that capacity, is exactly the same as how McLeod offers and bills power plant capacity to its own collocators. That evidence supports a Commission conclusion that Qwest's practices are both reasonable and non-discriminatory. Finally, as also discussed above, nothing prohibits Qwest from providing and billing for a superior level of power plant capacity to CLECs than it does to itself – and McLeod's previous lack of protest to these ICA terms confirms that it

[16] Changing the terms of interconnection agreements "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

[17] *Application for Rehearing, pp.8-9.*

freely agreed to them.

McLeod further claims, at page 9 of its Petition, that "there is no debate that Qwest's charging McLeodUSA for power plant capacity based on the size of the power feeder cables (which Qwest assumes is List 2 drain) violates the nondiscrimination prohibition of Section 251(c)(6) as explained by the FCC." This claim is remarkable because it is so far off the mark. Indeed, there is heated debate on this contention, which is merely a summation of McLeod's argument, but which is also disputed by Qwest for all the reasons set forth in this and other filings.

Qwest's collocation power provisioning is also non-discriminatory because the CLECs are getting what they pay for, and paying for what they get. Mr. Ashton's testimony explains how Qwest makes available to CLECs the amount of power plant capacity they order. Qwest then charges for power plant in accordance with Commission-approved rates. Both Qwest and the CLECs incur power plant costs relative to the amount of power plant capacity made available to them. Of course it may be that in the real world Qwest also incurs costs for the spare capacity of the plant, and costs for the central office to house the plant, and costs associated with planning for future power needs, all of which benefit the CLECs in some non-quantifiable way, and which costs are not directly assessed to the CLECs. Thus, there is simply insufficient basis upon which to find that Qwest's pricing structure for power plant is discriminatory, which is why these rates were approved in a cost docket in the first instance, where these types of issues can be explored.

3. McLeod misrepresents the cost docket order.

Finally, McLeod argues in its Petition, as it did in its Exceptions, that this Commission has already decided this issue in the cost docket and that Qwest's billing violates the cost docket.[18] McLeod states that the Arizona Commission has already recognized that "using cable amperage

[18] Application for Rehearing, pp. 9-10.

to bill for DC power was inconsistent with TELRIC pricing principles in Qwest's prior cost docket, which ruling Qwest apparently chose to ignore." McLeod goes on to suggest that Qwest has been billing McLeod for "the maximum capacity of the cabling" in contravention of the ruling in the cost docket.

McLeod's characterization of the cost docket order is, at best, irresponsible. The Arizona cost docket order is among the clearest in any of the states in which this dispute has been brought in terms of examining the issue of how the rate was developed. McLeod has completely misrepresented the cost docket ruling on power costs, which reads, in relevant part, as follows: "According to Qwest, it bills for load amps which can be more than the amount actually used, but ***corresponds to the amount ordered***. Fused amps, on the other hand, reflect the maximum capacity of the cabling, which usually exceeds the load amps by 50 percent. Qwest claims that it does not bill for fused amps or redundant feeds. . . . We agree with Qwest [with regard to why WorldCom's arguments should be rejected]. Therefore, we will adopt Qwest's proposed power costs."[19]

Contrary to McLeod's assertions, Qwest has not billed on the fused amps, which reflects the maximum capacity of the cabling, and which may in fact be double the amount of ordered amps.[20] Qwest has consistently billed based on "load amps" as described, considered, and approved in the cost docket – the ordered amount. This is completely consistent with the cost docket and completely contrary to McLeod's argument on this point.

III. CONCLUSION

For the reasons stated herein, the Commission should deny McLeod's Application for Rehearing

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[19] In The Matter Of The Investigation Into Qwest Corporation's Compliance With Certain Wholesale Pricing Requirements For Unbundled Network Elements And Resale Discounts, Docket No. T-00000A-00-0194; Decision No. 64922 at 43. (Arizona Corporation Commission June 12, 2002) (emphasis added).

[20] Tr. 355.16-21. "[S]ome CLECs drew very close to their actual order. In fact, some drew more than their order. Because of the redundant nature of the feeds, the A and B feeds, it is physically possible to draw in excess of 200 percent of what is ordered and some CLECs have done that."

and affirm its August 28, 2007 Opinion and Order denying McLeod's complaint on both the contract interpretation issues and McLeod's discrimination claim, and sustaining Qwest's counterclaim on these issues.

DATED this 28th day of September, 2007.

Respectfully submitted,

Timothy J. Goodwin
Lisa A. Anderl
QWEST SERVICES CORPORATION
1801 California St., 10th Floor
Denver, CO 80202
Telephone: (303) 383-6612
Fax: (303) 383-8512
e-mail: tim.goodwin@qwest.com

ATTORNEYS FOR QWEST CORPORATION

CERTIFICATE OF SERVICE

Original and 15 copies of the foregoing
filed this 28th day of September 2007 with:

Docket Control
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered/mailed
this 28th day of September 2007 to:

Chairman Mike Gleason
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Commissioner William A. Mundell
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Commissioner Jeff Hatch-Miller
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Commissioner Kristen K. Mayes
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Commissioner Gary Pierce
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Jane L. Rodda
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Maureen A. Scott
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

Michael W. Patten
Roshka DeWulf & Patten, PLC
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

William A. Haas, Deputy General Counsel
William H. Courter
Associate General Counsel
6400 C Street SW
Cedar Rapids, Iowa 52406